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No. 215

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In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIS K. BAKER, JR., and MERVIN "BUD" CORNELSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. E) is reported at 393 F. 2d 604.

JURISDICTION

The judgments of the court of appeals (Pet. App. A) were entered on April 4, 1968. A petition for rehearing was denied on May 21, 1968. The petition

for a writ of certiorari was filed on June 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in its instructions relating to the scienter requirement or the reasonable doubt standard.

2. Whether petitioners were prejudiced because a co-defendant who had pleaded guilty was permitted to testify against them prior to being sentenced.

3. Whether it was error to permit the co-defendant to state, at the beginning of his direct testimony, that he had pleaded guilty.

STATEMENT

After trial by jury in the Southern District of California, petitioners were convicted on one count of conspiring with others, Rush and Stephenson, to violate 18 U.S.C. 641 by receiving and converting stolen government property. Petitioner Baker was sentenced to two years' imprisonment and fined $10,000 on the conspiracy count,[1] and Cornelsen to two years' imprisonment, with all but the first six months suspended.

Baker was the proprietor of an aircraft parts and supply company, and Cornelsen was one of his employees (IX R. 917). The evidence showed that Rush,

[1] Baker was also convicted of a substantive count of receiving stolen government property in violation of Section 641 and given a concurrent sentence of two years' imprisonment.

a stockman in the stowage branch of the aviation warehouse at the Lemoore Naval Air Station (V R. 196), stole items of equipment from the warehouse and sold them to Stephenson, who in turn resold them to petitioners. The first transactions involved parachutes and altimeters (VI R. 387-390). Thereafter, Baker indicated to Stephenson that he was interested in aircraft instruments and would purchase all of the instruments which Stephenson could supply (VI R. 393). After a time, to ensure obtaining equipment for which they would have a market, petitioners furnished Stephenson with written lists of specific aircraft components which they wanted (VI R. 398). When Rush furnished items which were similar to those requested on the lists, but not the exact parts desired, Cornelsen met with him and Stephenson and explained that in the future he would provide federal stock numbers, which he said he had a way of obtaining, in order to insure that he was getting the exact items desired (VI R. 406-408). It was also decided at this meeting to make no further purchases for a time because Rush informed them of a pending investigation at the air station (VI R. 409).

At one point, Baker inquired of Stephenson whether his source was making sales to others. When Stephenson replied that he thought so, Baker suggested that if the source could sell to them alone, the chances of discovery would be reduced (VI R. 399). On another occasion, Cornelsen, in Baker's presence, suggested to Stephenson that "[y]ou ought to have your boy cool it or be careful" (VI R. 405). Petitioners and Stephenson would remove all government markings and

labels from the items and their containers when Stephenson delivered them, and would remove and burn the packing data and stock labels (VI R. 402-404). Cornelsen explained that by scraping the labels off they would be able to save the barrels and containers for future use, and anyone who might "pay us a visit" would not "see what's on them" (VI R. 406). An employee of Baker, observing petitioners painting over the government labels on expensive equipment that looked too new to be surplus, inquired whether the items were "hot" and was told that everything was taken care of and not to worry about it (VII R. 606-608). Another individual who asked Baker if an item of equipment which Baker offered him for sale was "hot" (because he also had seen petitioners painting over the identification numbers) was informed that it was "a little warm" (VI R. 320-324). Stephenson testified that, while he never actually stated to petitioners that the items he was supplying were stolen property (VII R. 572), everybody concerned assumed that they were stolen (VII R. 572-574, 584) because they came in the original government containers with government tags attached (VII R. 585).

ARGUMENT

1.*a.* The trial court instructed the jury that it had to find that the items in question belonged to the United States and that petitioners knew that they were stolen, but did not instruct that petitioners must have known that they were stolen from the United States (XI R. 1283). There was no objection to the

instruction. Indeed, petitioners' counsel submitted a proposed scienter instruction to the trial court that made no mention of the necessity of proving knowledge that the stolen property was government-owned (I R. 72). The alleged error in the instruction was first urged in a petition for rehearing in the court of appeals. The court of appeals understandably did not discuss the point. Under the circumstances, the decision below does not, as petitioners contend, necessarily conflict with decisions holding that knowledge that the property belonged to the United States is an element of a charge of conspiring to violate 18 U.S.C. 641. Moreover, the Ninth Circuit itself has indicated that knowledge that property was stolen from the United States is an element of even a substantive offense under 18 U.S.C. 641. *Souza* v. *United States*, 304 F.2d 274 (C.A. 9).

Accordingly, the issue here is actually whether the trial court's error in instructing on the scienter element was of such dimension that this Court should reverse the convictions despite the absence of objection at trial and the failure to raise the issue on appeal. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. There is, we submit, no occasion for such action by this Court. While petitioners defended on the claim that they did not know the property was stolen, this issue was resolved against them on ample evidence. The government's evidence showing that petitioners knew the property was stolen—which the jury credited—necessarily showed that petitioners knew the property was stolen from the United States.

b. Toward the conclusion of its instructions, the trial court said (XI R. 1286):

> There is nothing different in the way a jury is to consider proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

This was followed immediately by the words: "If the accused be guilty, beyond a reasonable doubt, say so. If not, say so" (XI R. 1286). No objection was made by petitioners' counsel. If there were any possibility of confusion to the jury, petitioners had a duty to point it out to the court so that the court could have instructed further and removed the confusion. It is, however, clear that the court's concluding instruction did not conflict with or derogate in any manner from the usual instruction on reasonable doubt which it had previously given (XI R. 1264). Petitioners' extraction of one sentence in the instructions out of context, and characterization of that sentence as an "anti-reasonable doubt instruction" (*e.g.*, Pet. 6), is thus unjustifiable and misleading.

2. After Stephenson's plea of guilty and petitioners' pleas of not guilty, trial was set for May 11, 1966, and Stephenson's sentencing was set for May 23 (I R. 6). Stephenson, upon pleading guilty, had filed a motion for probation (VI R. 434). On May 11, the trial was continued until May 24 because a key government witness was not available (I R. 7). On

May 23, the sentencing of Stephenson was continued, on his motion, until June 6 (I R. 150; VI R. 437). Petitioners made no objection to Stephenson's appearance as a witness until their motion for a new trial (XII R. 1306). They urged before trial, however, that the fact that he would not be sentenced until after he testified gave them the right to take his deposition (III R. 81). Contrary to petitioners' contention, there is no rule rendering an unsentenced accomplice incompetent to testify, or requiring the reversal of a conviction based upon his testimony in the absence of proof of actual perjury (which is not offered here). *Lemons* v. *United States*, 339 F.2d 761, 764 (C.A. 9), certiorari denied, 380 U.S. 985; see *Cobb* v. *United States*, pending on petition for certiorari, No. 231, this Term. Nor was there any reason to permit petitioners to use the deposition process with respect to Stephenson in advance of trial.

3. At the beginning of Stephenson's testimony, the prosecutor elicited his admission that he had pleaded guilty (VI R. 384-385). Petitioners' counsel objected, and at the start of cross-examination moved for a mistrial, which was denied (VI R. 420-422). The trial court thereafter instructed the jury that it could not consider Stephenson's guilty plea as evidence against petitioners, but could consider it only in respect to determining the witness's veracity (XI R. 1271-1272). In light of this cautionary instruction, receipt of Stephenson's testimony was not erroneous. *Jiron* v. *United States*, 306 F.2d 946, 947 (C.A. 10). In such a situation, there is error only if the cautionary instruction is not given

(*Babb* v. *United States*, 218 F.2d 538, 541-542 (C.A. 5)), or if the jury is instructed that it can consider the guilty plea as evidence against the defendant. *United States* v. *Toner*, 173 F.2d 140, 142 (C.A. 3). This was not a case where the conviction, guilty plea or confession of an accomplice was used as hearsay evidence, thus precluding any opportunity for cross-examination, as in the cases on which petitioners rely (Pet. 17). *Kirby* v. *United States*, 174 U.S. 47, 53-54; *Pickens* v. *Oliver*, No. 1076, 1967 Term, decided June 10, 1968; *United States* v. *Hall*, 178 F.2d 853, 854 (C.A. 2). Stephenson was available for and was subjected to cross-examination by petitioners' counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1968.

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